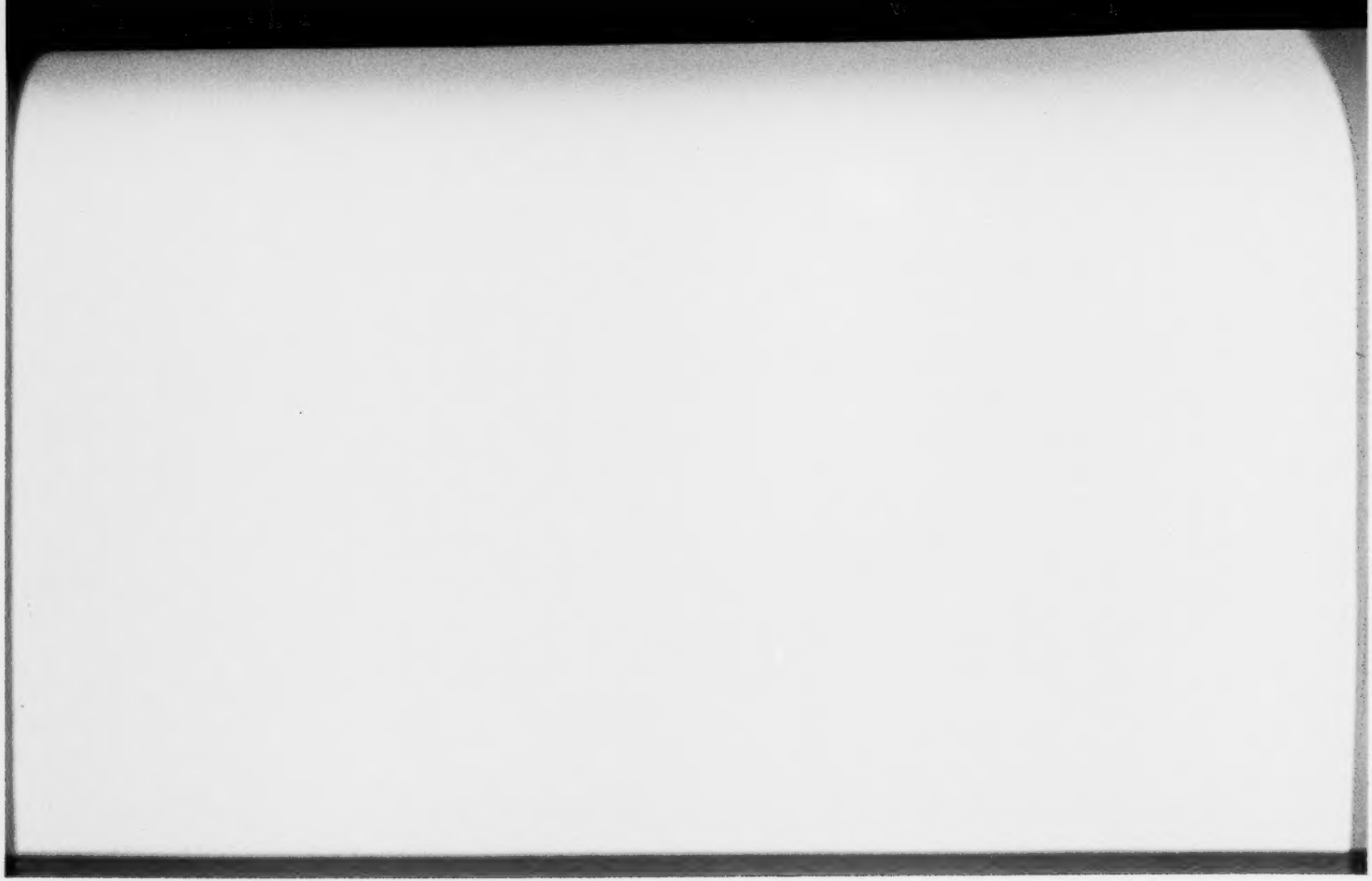

INDEX

CITATIONS

489604—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 431

H. T. POINDEXTER & SONS MERCHANDISE COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Western District of Missouri (R. 47) is reported in 40 F. Supp. 787. The opinion of the Eighth Circuit Court of Appeals (R. 70) is reported in 128 F. (2d) 992.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1942 (R. 74), and the petition for a writ of certiorari was filed September 29,

1942. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court of Appeals erred in holding that the evidence presented by the taxpayer was insufficient to establish, within the meaning of Section 902 of the Revenue Act of 1936, that it had not shifted to other persons the burden of a floor stocks tax, imposed under the Agricultural Adjustment Act of 1933.

STATUTES INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.
>
> No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—
>
> (a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through

inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof, or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (U. S. C., Title 7, Sec. 644.)

STATEMENT

Between August 31, 1933, and February 17, 1934, the taxpayer, which is engaged in the business of selling merchandise processed wholly or in large part from cotton, paid $44,976.22 in floor stocks taxes which were imposed pursuant to the Agri-

cultural Adjustment Act of 1933. After the Act was declared unconstitutional by this Court in *United States* v. *Butler,* 297 U. S. 1, the taxpayer brought this suit for a refund of those taxes pursuant to the provisions of the Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 902; 7 U. S. C., Sec. 644. Taxpayer claimed that it had paid the tax, that it had neither passed the tax on to other persons in any way, nor been reimbursed therefor, and that it was, therefore, entitled to a refund (R. 1–6). The United States denied that the tax had been borne by the taxpayer and contended that therefore, no refund was allowable (R. 6–7). The taxpayer's motion for a summary judgment upon the pleadings, supporting affidavits, and copies of records was granted, and the United States' motion for a summary judgment was denied.

The District Court found that although the taxpayer had increased the prices of its merchandise on August 1, 1933, at the same time that the floor stocks tax became effective, this increase was ascribable to factors other than a desire to compensate for the burden of the tax. The factors found to impel the increase were: (1) the price of cotton-content merchandise for the preceding two months had been subnormal; (2) the cost of doing business increased after August 1, 1933; (3) the taxpayer's bad debts increased materially after August 1, 1933; and (4) there was a general increase

in the market prices or value of cotton-content merchandise (R. 53–54). Upon these findings of primary facts the court concluded that the taxpayer had not directly or indirectly shifted the burden of the tax to others (R. 54).

The Circuit Court of Appeals reversed the District Court's conclusion, holding that the evidence did not show that the burden of the tax had been borne by the taxpayer or had not been shifted to others (R. 74).

ARGUMENT

It is established that the taxpayer increased its prices on August 1, 1933. There is also evidence in the record to support the contention that this increase was due partly to causes other than the imposition of the floor stocks tax on that date (R. 16–17, 30). However, the taxpayer failed to establish that in fact the increase in prices did not include a sum which would cover the tax, over and above any amounts attributable to other factors. Thus, the taxpayer because of the unavailability of its sales invoices (R. 15–16, 33), was unable to show the price at which it actually sold its taxed inventory. Instead it resorted to a more generalized and less adequate calculation based on average prices on a portion of its inventory over the period between August 1, 1933, and December 31, 1933 (R. 31–36). The character of the increases and the elements of which they were composed were, therefore, not shown in any meaningful manner. *Cf. C. M. McClung & Co.* v. *United States,* 35 F. Supp. 464 (Ct.

Claims). And the evidence purporting to establish the "current market price" to which the taxpayer marked up its merchandise on August 1, 1933, does not show whether that price did not itself reflect the effect of the tax (R. 34–35). See *C. M. McClung & Co.* v. *United States,* 35 F. Supp. 464 (Ct. Claims); *Cf. C. B. Cones & Son Manufacturing Company* v. *United States,* 123 F. (2d) 530 (C. C. A. 7).

Against this background it is submitted that the Circuit Court of Appeals did not err in holding that the taxpayer failed to prove that it bore the burden of the tax within the meaning of section 902 of the Revenue Act of 1936. In requiring a more specific showing that the incidence of the tax was actually borne by the taxpayer the Circuit Court was consistent with the Third Circuit in *Honorbilt Products, Inc.,* v. *Commissioner,* 119 F. (2d) 797 (C. C. A. 3), which held that an inadequately explained price increase, itself sufficient to cover the tax, defeats recovery.

The asserted conflict with *C. B. Cones & Son Manufacturing Company* v. *United States,* 123 F. (2d) 530 (C. C. A. 7); *Arkwright Mills* v. *Commissioner,* 127 F. (2d) 465 (C. C. A. 4); and *Hutzler Bros.* v. *United States,* 33 F. Supp. 801 (D. Md.), rests on the assumption that the court below held that an increase in prices even though clearly attributable to other factors than the tax is sufficient to defeat recovery. However, the decision below

holds merely that the facts in this record do not establish that the increase in prices did not also compensate the taxpayer for the tax (R. 73–74). Under the statute the taxpayer is clearly obliged to establish this. Having failed to show with sufficient definiteness that the amount to which it increased its selling price was insufficient to cover its former selling price plus the tax or that it did not realize normal profits after the tax was paid, taxpayer has not carried the burden required by section 902.

CONCLUSION

The decision below is correct and there is no conflict. The petition for certiorari should be denied.

Respectfully submitted.

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OCTOBER 1942.

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